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## Sources of Law in Spain: An Outline

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## FOREWORD

This paper was originally written as a contribution to a research project on "Sources and Hierarchy of EC Law", directed by Prof. Gerd Winter **(Zentrum für Europäische Rechtspolitk an der Universität Bremen)** and financed by the European Parliament. It will also appear in a collective publication: Gerd Winter (ed.), **Reforming the Categories and Hierarchy of EC Legal Acts**. I would like to express my gratitude to the editor for his kind authorization to publish my study in the EUI Working Papers series.

The original purpose and the necessarily limited dimension of this paper help to explain why it is not an exhaustive analyisis of the Spanish system of sources of law, but only an overall exposition of its major characteristics. Some questions which may be of particular interest for a potential reform of EC law have been discussed in detail. In any event, my objective has been to provide a clear overview of the **status quaestionis**. Given the complexity of the system of sources of law in Spain, a more ambitious approach would have been naive.

Rory O'Connell has generously read the text and made many suggestions to improve its intelligibilty. I am grateful to him.

Fiesole, 19 October 1994.

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## ABBREVIATIONS

| | |
|---|---|
| CE | Constitución Española (Spanish Constitution of 1978). |
| LOPJ | Ley Orgánica del Poder Judicial (Organic Law of the Judiciary of 1985). |
| LOTC | Ley Orgánica del Tribunal Constitucional (Organic Law of the Constitutional Court of 1979). |
| STC | Sentencia del Tribunal Constitucional (Judgement of the Constitutional Court, cited according to its official numeration). |
| STS | Sentencia del Tribunal Supremo (Judgement of the Supreme Court, cited according to its date). |

# I. SOURCES OF LAW AS A SYSTEM.

## 1. The Constitution and its binding force.

The Spanish Constitution of 1978 is not intended to be a merely programmatic or political document. It is an entrenched constitutional charter (Arts. 166 and 167 CE), hirerarchically superior to any other rule of the domestic legal system and legally binding both on private individuals and public authorities (Art. 9.1 CE). The Constitutional Court has repeatedly declared that, except for the Preamble, the whole Constitution is to be treated as having fully normative value (STC 15/1982, 16/1982, 80/1982, etc.). Therefore, there are not any purely declaratory clauses in the Constitution.

However, not all the constitutional provisions create the same degree of obligation. There is a minimum legal force, common to all of them, namely that every constitutional provision binds the legislature. This means that, if a statute or any other subordinate legal rule is found to be in contradiction with a constitutional provision, it may be invalidated. This is true even in relation to the so called "Guiding Principles of Social and Economic Policy", embodied in Chapter 3 of Title I of the Constituion, which mostly proclaim social rights. The fact that these principles may only be enforced by law courts once statutorily

implemented (Art. 53.3 CE) does not preclude their binding nature for the legislature. Other types of constitutional provisions, such as those which declare civil and political rights or establish the organization and functioning of State bodies, enjoy a stronger form of legal force and, consequently, are directly applicable.

The binding force of the Constitution means that it must be enforced by law courts. In Spain, there is a centralized model of judicial review of legislation. In other words, the power to decide about the constitutionality of statutes is vested in a single Constitutional Court (Arts. 161 and 163 CE), which is separated from the rest of the judiciary. Its twelve members are appointed in the following way: four by the Senate and four by the Chamber of Deputies, in both cases through qualified majority; two by the General Council of the Judicial Power and two by the Government. Their tenure is of nine years and they may not be immediately reappointed. The Constitutional Court has exclusive jurisdiction to invalidate statutes and international treaties. This can take place through two different procedures. The first is the direct recourse, for which only certain public bodies (50 Deputies, 50 Senators, the Prime Minister, the Ombudsman and the Regions) have standing within a deadline of two months after the promulgation of the challenged statute. The second form is the preliminary ruling, where a law court poses a question as to constitutionality at

any time, provided that the challenged statute is relevant for the decision of a pending case. In addition, the Constitutional Court has also exclusive jurisdiction to decide the conflicts between the State and the Regions.

The existence of a specific Constitutional Court, however, does not mean that the other law courts may not apply the Constitution. On the contrary, they have a positive duty to do so. Not only must they assess the constitutionality of legislation, which can lead to a question to the Constitutional Court, but they must also enforce directly applicable constitutional provisions. This is especially important in the field of fundamental rights, where the direct recourse of individuals to the Constitutional Court (**recurso de amparo**) has a subsidiary nature with respect to ordinary judicial protection. In other words, this form of access to the Constitutional Court is conditioned on the exhaustion of ordinary judicial remedies. In addition, as far as constitutionality of norms is concerned, the monopoly of the Constitutional Court covers only statutory law. So inferior legal rules may be declared unconstitutional by ordinary courts.

2. Basic principles governing the system of sources of law.

The Constitution has introduced an extremely, sometimes unnecesarily, complicated system of sources of law. It is mainly characterized by the

subdivision of statutory law into different types of statues, a remarkably wide sphere for administrative rule-making and the autonomuos law-making power of Regions. An overall picture of the system would be, more or less, like this:

Constitution

Interposed Norms

| State: | | Regions: |
|---|---|---|
| International Treaties and | | |
| Statutes (Organic Laws/Ordinary Laws) | | Statutes |
| Regulations | Local Regulations | Regulations |

In order to understand corrrectly the various types of legal rules, as well as their reciprocal relations, it is necessary to look briefly at three groups of constitutional principles which inspire and govern the whole system of sources of law.

A) **Hierarchy and competence**.

As is perfectly known, the principle of normative hierarchy means that an

inferior rule may not contradict a superior one and, if this happens, the inferior rule is void. Normative hierarchy, explicitly proclaimed in Art. 9 of the Constitution, is the main governing principle of the Spanish system of sources of law. Thus, the Constitution is the supreme law of the whole system, statutes are superior to administartive regulations, etc.

Nevertheless, there are certain types of legal rules whose reciprocal relationships do not have a hierarchical nature. This is due to the fact that their respective normative spheres do not coincide, either subtantively (different subject-matters) or geographically (different territories). In this case, the governing principle is competence, in the sense that only the competent type of legal rule may govern that subject-matter or that territory. The principle of competence determines the relationship between organic laws and ordinary laws, as well as that between State law and Regional law on the whole. For example, strictly speaking, one may not say that a Regional regulation is hierarchically subordinated to a State statute.

Two further features of these two principles must be underlined. On the one hand, any violation of either principle involves the invalidity of the legal rule thus produced. On the other hand, hierarchy and competence operate in a different way. The principle of hierarchy means that an inferior rule must not

be in contradiction with a superior one. Therefore, in order to assess the compliance with hierarchical requirements, it is necessary to compare the subtantive contents of two rules. The principle of competence means that only a certain type of rule may regulate a given subject-matter or within a given territory, so that an incompetent rule will be void even if its substantive content is compatible with that of other competent rules. The compliance with the principle of competence involves a purely formal evaluation.

B) **Rationalized parliamentarism.**

Among the main original objectives of the Spanish Constitution was governmental stability. For this reason, a series of devices was introduced: a Senate with lesser powers, possibility of governmental veto over the introduction of financial bills, individual parliamentary investiture of the Prime Minister, designation and dismissal of members of the Government by the Prime Minister, constructive vote of no confidence, etc. In addition, the electoral formula for the Chamber of Deputies, which is proportional but with some restrictions (so-called "D'Hondt rule"), favours the emergence of few big political parties and, in this sense, of a genuine dualism majority-opposition. All these factors have led to a rationalized version of parliamentarism or even to a variety of **Kanzlerdemokratie**. This form of government, moreover, has been basically

reproduced at a regional level.

These considerations are relevant in the field of sources of law. Without prejudice to what will later be said about the debate over the scope of administrative rule-making, it is a fact that the Government has an autonomous, albeit indirect, democratic legitimacy and, consequently, it is widely acknowledged that the major political antagonism does not take place between Government and Parliament but between majority and opposition. The corollary of this is that statutory law is no longer regarded as the major gurantee of freedom. Parliament tends to be conceived predominantly as a forum for political debate and supervision of governmental action. If one adds that the rule of law is protected through a vast complex of judicial remedies, including the **recurso de amparo** for fundamental rights, it is easy to understand that the growth of administrative law-making is not, as such, seen as a cause for concern.

C) **Political decentralization.**

Spain has a politically decentralized structure. It is only because of emotional connotations attached to certain words that it is not defined as a federal country. The 17 existing Regions have a parliamentary form of

government and enjoy legislative and administrative powers. There is, however, a single judiciary for the whole nation.

Not all the Regions have the same powers, because the politically decentralized structure was not directly created by the Constitution. Due to a lack of a general consensus in this respect during the constituent period, the Constitution simply established the legal basis for a process of decentralization. Thus, each Region has been created through its corresponding statute of autonomy, which is simultaneously its basic norm. It is the statute of autonomy that defines the Region's powers.

Generally speaking, Regions have three types of powers: exclusive legislative power in a few fields (land planning, social welfare, etc.); concurrent legislative power in many areas (health care, transport, environment, etc.); executive power in some fields which belong to the State exclusive legislative power (water use, libraries and museums, etc.), as well as in those areas where they have legislative powers. For this reason, both statutory law and administrative law-making are produced at State and Regional level. The relationship between State law and Regional law is governed by the principle of competence. The constitutional clause of priority of State law (Art. 149.3 CE) operates only whenever the Regions do not have an exclusive power.

3. The role of judicial case-law.

In order to have a panoramic view of the Spanish system of sources of law, some reference has to be made to the status of case-law. As happens in most countries which belong to the civil law family, case-law has not tradionally been regarded as a genuine source of law, at least in the same sense as legislation or custom. It has been conceived as a sort of complement or an instrument for the uniform interpretation and application of rules with a legislative origin. However, the complexity of modern society and a clear process of decodification of the legal system have led in practice to an increasing importance of judge-made law. This, in its turn, has opened a debate on whether it is possible or not to speak of case-law as a real source of law.

Given the unquestionable present importance of the judicial function giving sense to obscure legislation and filling in legislative gaps, the debate has a predominantly abstract nature. But there are two aspects of it which deserve to be stressed. On the one hand, the case-law of the Constitutional Court is a genuine source of law, legally binding upon all the other law courts. The Organic Law of the Judiciary explicitly states that judges must interpret every legal rule in conformity with the Constitution and that, in doing so, they must follow the Constitutional Court's case-law (Art. 5 LOPJ). On the other hand, the

case-law of the different sections (civil, criminal, labour and administrative) of the Supreme Court does not have the same formal binding force. Despite its authoritativeness and persuasive force, no judge would behave unlawfully if he deviated from the Supreme Court's established interpretation of legislation. Morover, it is precisely this judicial interpretative independence that allows a renewal of case-law (Art. 117 CE). This statement is important because, in civil law countries, judges are liable for their judicial activity. In this sense, no Spanish judge could ever been held liable for not having followed the Supreme Court's case-law. Neither criminally nor in disciplinary terms, does such deviation amount to an unlawful behaviour.

## II. THE LEGISLATIVE FUNCTION.

### 1. Formal characteristics of statutes.

In Spain, a statute is any normative document which has been enacted by the legislature. This definition includes, of course, Regional legislatures. State statutes have to be approved by simple majority in both houses, signed and promulgated by the King, who lacks any veto power, and published in the official journal (Arts. 90 and 91 CE). With the exception of certain subject-matters (international affaires, financial legislation, organic laws and framework legislation), either house can delegate the final approval of a bill to a parliamentary committee (Art. 75.2 CE). The statute thus passed has the same force as if it had been approved by the whole house. As for Regional statutes, they have to be approved by simple majority in the unicameral Regional Parliament, signed and promulgated by the Regional President, who also lacks any veto power, and published in the corresponding journal. Publication of Regional statutes in the national official journal is also compulsory, but it does not determine the date of their coming into force.

Although they are sometimes drafted in a vague and declamatory way, all statutory provisions are deemed to have binding legal force. The only exceptions

are preambles, which are not infrequent and have a purely explanatory value. Statutes are divided into articles. These basic statutory provisions are usually grouped into chapters and titles.

All statutes are directly subordinated to the Constitution. In the scale of normative hierarchy, there is not any other source of law between the Constitution and statutes. In principle, all of them enjoy the same legal status, which is defined as statutory force. This means that any legal rule having statutory force can repeal previous statutory law and, conversely, only a new rule with statutory force will be able to abrogate it. As has been said, only the Constitutional Court has the power to invalidate rules with statutory force.

2. The scope of legislative power and the contents of statutes.

Contrary to what happens in other countries where parliamentarism has been subject to rationalization, in Spain there is no restriction on the law-making power of Parliament. The legislature may pass a statute on any conceivable issue, of course as long as it does not violate a constitutional provision. In practice, respect for fundamental rights is the only limit of statutes and there is no sphere reserved to administrative rule-making.

This principle is applicable to Regional statutes too. But it has to be qualified, in the sense that Regional Parliaments may legislate about any issue only within their scope of competence. There is no Regional reserve of administrative rule-making either. As far as State statutory law is concerned, it may affect any subject-matter, because State law is subsidiary **vis-à-vis** Regional law (Art. 149.3 CE); that is, State law must be used to fill in the gaps in Regional law. Since not all the Regions have identical legislative powers, the State may legislate without encroaching on the competence of some Regions. Incidentally, this helps to understand why the national legislature tends to behave as if it were still in a centralized country.

Regarding the contents of statutes, there is no explicit constitutional requirement. In particular, statutory rules need not have a general and abstract nature. They may, in principle, regulate single situations or be adressed to single individuals. However, one must take into account three different factors in this respect.

First of all, singular laws, as they are usually called, can be classified into two very different categories. On the one hand, are those statutes which are envisaged, by the Constitution or by a general statute, in order for an administrative decision to be valid. For instance, certain State contracts or the

selling of some State property must be previously authorized by a specific statute. In this case, singular laws have a merely organizational nature, as a means for Parliament to control executive action. On the other hand, are those statutes which directly affect individuals, by restricting their rights or imposing duties on them. Only this second category may be seriously questioned in constitutional terms.

Secondly, since 1978, there has been only one case of a law which directly encroached on an individual's rights. It was the expropriation of Rumasa, a relatively important industrial and financial group, in early 1983. The alleged reason was that its unorthodox practices were a danger for national economic stability; and the legal mechanism was a decree-law, which was later ratified and transformed into a statute by Parliament. In its most important ruling concernig this case (STC 166/1986), the Constitutional Court upheld the constitutionality of the measure. In substance, a deeply divided Court said that there was no violation of the principle of equality before the law (Art. 14 CE) because extraordinary circumstances may allow for individualized legislation. Up to that point, the argumentation was reasonably acceptable. Less convincing and bitterly criticized by many scholars was its finding that there was no violation of the right of access to justice (Art. 24.1 CE) on the ground that the case had partially arrived at the Court itself for a preliminary ruling. It is a fact, however,

that in this type of procedure parties to the original process may not appear before the Constitutional Court. In addition, the **recurso de amparo** might not have been used, since individuals' direct challenge against statutes is not admissible. In sum, there is no direct remedy against statutes in Spanish law. It was precisely for this reason that, when the case arrived at the European Court on Human Rights, Spain was condemned for violation of Art. 6 of the Convention (**Ruiz Mateos v. Kingdom of Spain**, 23 June 1993). Moreover, one could also argue that singular laws deprive affected individuals of guarantees inherent to administrative procedure.

Lastly, it is undeniable that there has been a very limited use of singular laws in recent times. This is due not so much to its questionable constitutional validity, as to the circumstance that a rationalized variety of parliamentarism puts so many instruments in the hands of Government that, politically speaking, singular laws are not really needed.

3. Organic laws.

The Spanish Constitution of 1978 has adhered to the idea of organic laws; that is, given the political importance of certain legal issues, a wide parliamentary consensus seems desirable. So by imposing a qualified majority

requirement, stability of legislation may be attained. In this respect, the basic question is how to determine what are those politically sensitive issues. One has to keep this question in mind in order to understand why the status of organic laws is so complicated in Spanish law.

### A) The origin of organic laws.

In Spain, the transition from dictatorship to democracy was conducted in a spirit of national reconciliation, which involved a wide consensus among the most important political forces. The Constitution was, thus, intended to be the common basic framework for all citizens. This specific context helps to explain two characteristics of the Spanish Constitution. First, it sought to extend this principle of consensual decision-making to future relevant problems even if they did not have a true constitutional nature. Secondly, in those constitutional points where consensus was not reached, no decision was taken and the lacuna should have to be filled in by a future qualified majority. The instrument was, in both cases, the organic law. Examples of the first category include the implementation of certain bodies and procedures envisaged in the Constitution (Ombudsman, Constitutional Court, judicial organization, elections, etc.); as for the second category, the main problem which the Constitution left open was the territorial structure, i.e. political decentalization.

However, as a reaction to the lack of legal guarantees under the dictatorship, the Constitution added a third sort of hypothesis where the wide consensus inherent to organic laws had to be reached: legislation which systematically develops some subject-matter within the scope of fundamental rights. As will be seen, it is in this open clause where lies the source of all the theoretical and practical problems posed by organic laws.

B) **Definition and requirements**.

The constitutional definition of organic laws (Art. 81 CE) is twofold: formal and substantive. Formally, passing organic laws requires an absolute majority in the Chamber of Deputies, which must be reached in a final vote on the whole bill. In other words, consensus has to be reached having an overall view of the final draft. The modification or abrogation of a previous organic law requires, of course, a new one. It is important to stress that absolute majority means half plus one of the **de iure** number of members of the house, as opposed to the number of present members. For the Senate's approval, however, simple majority is enough. In addition, since Art. 81 of the Constitution explicitly mentions the Chamber of Deputies, it is clear that Regional Parliaments may not pass organic laws. As far as substance is concerned, certain issuess must be regulated through organic laws: final approval of Regional statutes of autonomy,

general electoral law, some bodies explicitly mentioned in other constitutional provisions, and the development of fundamental rights.

The most relevant problem posed by organic laws concerns the relationship between their formal and substantive elements. Since its very first ruling on this topic (STC 5/1981), the Constitutional Court has always held that the concept of organic laws is not a purely formal one. This means that the legislature is not free to decide whether a given statute should be passed as an organic law. The constitutional definition of organic laws implies not only that certain subject-matters must be regulated by organic laws, but also that the potential sphere of organic laws is limited to those subject-matters. Such construction is based on democratic considerations, namely not to restrict unduly the freedom of future majorities. In order to define neatly the limits of organic laws, the Constitutional Court has declared that their relationship with ordinary statutes is not governed by the principle of hierarchy, but by the principle of competence (STC 5/1981, 6/1982, etc.). Two consequences derive from this statement. First, ordinary statutes are not unconstitutional for mere contradiction with an organic law, but only if they encroach upon a subject-matter reserved to organic laws; secondly, organic laws themselves are unconstitutional if they spill over their scope and invade the field reserved to ordinary legislation. This is the reason why an accurate definition of the subject-matters reserved to

organic laws is crucial.

In this respect, Art. 81 is reasonably unequivocal, except for its reference to fundamental rights. Nowadays, it is generally accepted that only those rights declared in Arts. 15 to 29 of the Constitution are covered by Art. 81 (STC 76/1983). However, another question remains open: what does it mean to develop fundamental rights for the purpose of Art. 81? It cannot mean any possible legislation which, even indirectly, affects a fundamental right. If it were so, given the **vis expansiva** of fundamental rights in a liberal democracy, entire sectors of the legal system should be governed by organic laws and that would be in contradiction with the above mentioned democratic considerations. For this reason, the Constitutional Court has established that only those laws which directly regulate some fundamental rights issue may be organic laws (STC 5/1981, 6/1982, etc.). But two doctrines qualify this basic statement. On the one hand, for the sake of clarity, coherence and good legislative drafting, the Constitutional Court allows the inclusion of other provisions into organic laws as long as they deal with connected subject-matters, i.e. subject-matters without whose inclusion an organic law would be technically deficient (STC 5/1981 and 137/1986). On the other hand, in order to avoid an excessive use of the connected subject-matters exception, the Constitutional Court allows the legislature to declare that certain provisions of an organic law lack organic

nature and, consequently, may be abrogated by an ordinary statute (STC 5/1981 and 76/1983). Needless to say, to reconcile this doctrine with the requirement that organic laws must be approved through a final vote on the whole bill is far from easy.

In spite of all these efforts, the Constitutional Court has not been completely successful in restricting the expansion of organic laws. This is due to the fact that some fundamental rights have a huge potential scope. The most significant example in this respect is personal freedom (Art. 17 CE). After some hesitations, the Court has ended up declaring that the definition of crimes and punishments needs to be accomplished through organic law because it involves a limitation of personal freedom, especially in the form of imprisonment (STC 160/1986). Thus, entire sectors of the legal system, such as criminal law or some aspects of criminal procedure, have undergone a process of entrenchment.

C) **An assessment of the practice**.

On the whole, one can fairly say that organic laws create serious difficulties without solving many problems. They may be helpful only as a means to postpone genuine constitutional decisions if the needed consensus cannot be reached during the constituent process. Even though, a careful and

accurate definition of subject-matters is indispensable. The Spanish experience of fundamental rights legislation is illuminating, since an accidentally strong majority in Parliament is able to paralize future weaker majorities. Ultimately, the real question is democracy: qualified majority does not make sense for ordinary law-making.

4. Interposed norms.

Interposed norms are those legal rules which are a development or an extension of the Constitution. In this sense, although they are subordinated to the Constitution, they are hierarchically superior to all the other sources of law, including organic laws. The major consequence of the existence of interposed norms is that they are used as criteria to assess the constitutionality of legislation (Art. 28 LOTC). Any law in violation of an interposed norm is invalid, exactly as if it were in contradiction with the Constitution itself. For this reason, some authors prefer to speak of the "block of constitutionality".

The function of interposed norms is to fill in a gap which the Constitution left deliberately open: the territorial structure of the country. Thus, it is through interposed norms that the Regions were instituted and the distribution of powers between the State and the Regions was established.

A) **Statutes of autonomy.**

A statute of autonomy is the normative document which, by implementing the corresponding constitutional provisions, creates an autonomous Region. It is the basic norm of that Region, i.e. the "Regional constitution". The statute of autonomy establishes the Regional political organization and defines the powers devolved to the Region. So, in order to know what powers belong to a given Region or to the State in that Region, one has to look into the corresponding statute of autonomy. The Constitution contains only a framework declaring what powers may be transfered to Regions. In this sense, the statute of autonomy is not only Regional law, but also State law. Is is constitutionally binding upon both levels of government.

As a consequence of their nature and function, statutes of autonomy must be enacted through a particularly complex procedure, which admits several varieties (Arts. 143 and 151 CE). What has to be stressed now is that, in any event, the procedure consists of two different stages, because the statute of autonomy must be approved first by the local authorities and possibly submitted to popular referendum, and only then ratified by the national Parliament through an organic law. As for their amendment, statutes of autonmy regulate their own amending procedure, but ultimate ratification by the national Parliament through

an organic law is also needed. Consequently, statutes of autonomy are especially rigid and cannot be characterized as normal organic laws.

B) **Art. 150 of the Constitution.**

Statutes of autonomy are the ordinary mechanism to devolve powers to the Regions and, therefore, to define the distribution of powers between the State and the Regions. However, the Constitution envisages the possibility for the national Parliament to affect unilaterally such distribution of powers by passing organic laws of delegation and laws of harmonization.

Through organic laws of delegation (Art. 150.2 CE), the State may devolve powers to the Regions without having to follow the complex amending procedure of statutes of autonomy. Organic laws of delegation are genuine interposed norms and, as such, may not be derogated or implicitly repealed by normal organic laws. But they present a disadvantage for Regions, because they are not as entrenched as the statutes of autonomy. They may be freely and unilaterally abrogated by the national Parliament. They were first used in the early 80's in order to put certain Regions (Canary Islands, Valencia, Navarra) at the highest level of self-government, equivalent to that of Catalonia, Basque Country, Galicia and Andalusia. A comprehensive organic law of delegation was

adopted in 1992, in order to expand the powers of all other Regions. Two objectives have been thus attained. First, the simultaneous opening of several amending procedures of statutes of autonomy, which would have been politically delicate, was avoided; secondly, some uniformity was introduced into Regional powers. In 1994, the corresponding statutes of autonomy were amended, in order to introduce into them the uniform powers first delegated to the Regions by the 1992 organic law.

Laws of harmonization (Art. 150.3 CE) enable the national Parliament to establish a minimum of legal uniformity throughout the country, even if it affects a subject-matter which belongs to Regional exclusive competence. Laws of harmonization are intended to be exceptional. Consequently, Art. 150.3 requires that, as a previous stage to the initition of legislative procedure, both houses declare by absolute majority that harmonization in a given field is necessary for the sake of the general interest. Once the bill is introduced, laws of harmonization are passed as ordinary statutes. However, the previous stage involves a very delicate political debate and, for this reason, no law of harmonization has ever been enacted except for an unsuccessful attempt in 1982. On that occasion, following an independent experts' report, the national Parliament passed a statute which harmonized the whole system of distribution of powers established by the statutes of autonomy. The Constitutional Court

invalidated that law of harmonization, basically because it was deemed to be an attempt to impose a particular interpretation of the Constitution itself (STC 76/1983).

## III. ADMINISTRATIVE RULE-MAKING.

### 1. Decree-laws.

Although they are passed directly by the Government, decree-laws have statutory force and, consequently, may repeal or modify previous statutes (Art. 86 CE). However, they may not affect fundamental rights, the organization of basic State bodies and the distribution of powers between the State and the Regions. In addition, they may be enacted only under circumsatances of "extraordinary and urgent necessity" and must be ratified by the Chamber of Deputies within the next 30 days. Ratification must take place through a vote on the whole decree-law. Alternatively, the Chamber may decide to transform the decree-law into a bill, in which case it may amend its contents. Thus, the assessment whether there was or not a circumstnace of necessity (i.e. a circumstance which did not allow for the deadlines of legislative procedure) is primarily a responsibility of the Chamber and, therefore, a political question. Nevertheless, the Constitutional Court has declared that, in extreme cases, it has the power to invalidate a decree-law for lack of extraordinary and urgent necessity (STC 29/1982, 6/1983, 60/1986, etc.). On the whole, one can say that there has been a reasonable use of decree-laws, especially in recent years. This is due not only to the fact that Governments normally have a sufficient majority

in Parliament, but also to the relatively wide sphere of independent administrative rule-making.

2. Charactersitics of administrative regulations.

Administrative regulations are legal rules passed by the executive or by other administrative bodies. More generally, one can say that they cover all forms of written law different from statutory law. Administrative regulations must be approved through the appropriate procedure and, in any event, must be published in the corresponding official journal. Moreover, all administrative regulations are hierarchically subordinated to sattutory law, so that no regulation is allowed to contradict a statute (Arts. 9.3 and 106.1 CE).

So far, the characteristics common to all types of regulations. However, contrary to statutes, regulations derive from a great variety of administrative rule-making authorities: the Cabinet, single ministers, Regional Governments, local authorities, etc. Within a single sphere of competence, regulations are ordered in a hierarchical way according to the position of their respective source. Thus, for example, ministerial orders are hierarchically subordinated to royal decrees, i.e. regulations approved by the Cabinet itself. In order to know what public bodies have administrative rule-making power, one has to look into

the statutes which create those bodies or delegate normative functions to them. In other words, there is not a general, constitutional recognition of administrative rule-making power, except for the Government as a collective body (Art. 97 CE).

Another important difference with statutory law is that administrative regulations must have general and abstract contents. They may not include singular rules. The reason for this lies in the principle of legality of administrative action (Art. 103.1 CE), which implies that administrative bodies may not deviate from legal rules even if such rules have been passed by themselves. This doctrine, which has been explicitly proclaimed in several statutory documents, is important for another reason, namely that there is not any **nomen iuris** or official name for some types of regulations. For instance, a royal decree is simply a decision taken by the Cabinet, no matter whether it is a genuine regulation or simply an individual administrative decision; but, according to the principle of legality, a royal decree embodying an administrative decision may not violate a ministerial order of regulatory nature. In sum, administrative bodies are not allowed to derogate from general rules.

3. The scope of administrative rule-making power and the problem of delegation.

The delimitation of the scope of administrative rule-making power in Spanish law is far from being linear and neat. First of all, there is a clear cleavage between present practice and traditional scholarly constructions, which had been partially followed by Supreme Court's case-law. These constructions, which were intended to restrict arbitrary administrative action under the dictatorship, were based on a traditional **Rechtsstaat** doctrine, namely that only through statutory law is it admissible to affect citizens' liberty and property. So, except for the field of administrative self-organization, all forms of administrative rule-making should be legitimized by statutory delegation. Nowadays, however, this doctrine is not respected in practice: in 1992, according to the entries in the official journal, only 50 State laws with statutory force were enacted, whereas some 400 State adminsitrative regulations were passed. This means that 88.9% of State law-making activity belonged to the category of administrative regulations. As for Regional law, taking into account only two significant Regions, the corresponding figures were 95.06% in Andalusia and 97.75% in Catalonia. These data show that, in practice, rationalized parliamentarism has produced an increase in the relative weight of

administrative rule-making. In addition, despite its ambiguity in this respect, the Constitution offers support for such a practice.

A) **Constitutional principles: reserves of statutory law and the recognition of the Government's rule-making power.**

The first element to be stressed is that the Constitution does not include a general reserve of statutory law, a sort of "liberty and property clause". There are many concrete reserves of statutory law throughout the Constitution, which deal with single subject-matters. It is also true that Art. 53.1 of the Constitution states that only through statutory law may fundamental rights be restricted or affected, so that some authors have invoked this constitutional provision in order to justify the existence of a general reserve. However, such interpretation is based on a dubious assumption, namely that the **vis expansiva** of fundamental rights is so powerful as to cover any kind of law-making affecting citizens' rights and duties. At present, there is no consistent case-law, either from the Constitutional Court or from the Supreme Court, which supports this construction. It is reasonable, therefore, to say that the Constitution does not forbid all forms of independent administrative rule-making. In other words, independent administrative regulations are, in principle, admissible in those fields which are not directly covered by an explicit reserve of statutory law. As

long as there is a relevant reserve, only statutory delegation may authorize administrative rule-making.

Secondly, one has to remember that there are no fields constitutionally reserved to administrative rule-making. So the legislature is free to legislate even in those fields which are not subject to a reserve of statutory law and, when this happens, any room for independent administrative regulations disappears. Any field may be preempted by the legislature and then, by virtue of the principle of hierarchy, administrative regulations are admissible only following statutory delegation.

Thirdly, as has been indicated, it is the legislature that defines what administrative bodies have rule-making power. This is in itself an application of the idea of delegation and, consequently, the legislature is free to decide the scope of every type of administrative rule-making power.

Lastly, one must not forget the existence of an important exception. The Government's administrative rule-making power has a direct constitutional origin (Art. 97 CE). As far as Regional law is concerned, similar provisions exist in some statutes of autonomy. It is generally accepted that this constitutional recognition of administrative rule-making power refers only to the Government

as a whole, i.e. the Cabinet as opposed to single ministers. Art. 97 may be interpreted as empowering the Government to pass administrative regulations without a previous statutory delegation, of course as long as they do not encroach on a constitutional reserve of statutory law and do not violate any statute. From a teleological point of view, this interpretation is perfectly consistent with the above mentioned democratic legitimacy of the Government inherent to rationalized parliamentarism. Moreover, it provides a constitutional justification for the practice of wide governmental rule-making.

B) **Delegation by the legislature: implementing regulations and withdrawal of statutory law.**

The most common form of delegation by the legislature is the authorization of implementing regulations. It takes place whenever a statute envisages its own development through administrative regulations. It is up to the statute to establish the conditions which the implementing administrative regulation must fulfill. In any event, statutory authorization to pass implementing regulations may never be presumed. It must be explicit. This requirement derives both from the principle of hierarchy and from the constitutional reserves of statutory law. In addition, it is generally accepted that, whenever the authorizing statute does not fix specific conditions, the delegation consists of two elements.

First, it is permanent, as long as the statute remains in force; secondly, it is subjected to the doctrine of the "indispensable complement". This doctrine means that the regulation must fill in those aspects where the statute is not complete, in order to produce a comprehensive body of rules inspired by identical principles; but it also means that the regulation may not introduce substantive innovations, nor develop the statute beyond what is strictly needed.

A radically different form of delegation takes place whenever the legislature authorizes direct administrative rule-making in a field formerly governed by statutory law. This phenomenon amounts to a withdrawal of statutory law and, therefore, is constitutionally valid only in those areas which are not covered by a reserve of statutory law. Much the same may be said of those cases where a statute simply states some guiding principles and defers to administrative regulations the bulk of the rule-making activity. An important sector where this happens is that of administrative organization, which includes the creation or abolition of ministries themselves. Art. 103.2 of the Constitution imposes a sort of relative reserve, according to which only the general principles of administartive organization must be established by the legislature. In this way, the Constitution gives public administration a power of self-organization. Needless to say, this does not imply that the Government is not politically accountable for its organizational choices, which in addition may be controlled

by Parliament through budgetary appropriations.

C) **The sphere of independent administrative rule-making.**

As a corollary, it should be clear now why there is such a quantitative predominance of administrative regulations over statutory law. One has to consider that much of the rule-making activity inherent in the welfare state and in the process of public regulation has an organizational nature. In this field, Spanish law acknoledges the admissibilty of independent administrative regulations. The same holds true, in practical terms, for most of the fields not covered by an explicit constituional reserve of statutory law.

4. Local authorities' regulations.

The pattern which has just been described is not entirely applicable to local authorities' regulations. No doubt, these regulations are hierarchical subordinated to State and Regional statutes and they must deal with subject-matters for which local authorities are responsible (land planning, transport, community services, etc.). However, local authorities' regulations have two distinctive features.

On the one hand, the constitutional guarantee of local autonomy (Art. 137 CE) involves that a minimum sphere of local competence must be safeguarded in any event and, consequently, municipalities and provinces may not be statutorily deprived of their rule-making power (STC 32/1981 and 214/1989). The main role of State and Regional legislatures in this respect lies in defining the scope of local responsibilities and regulating the mechanisms of local rule-making power.

On the other hand, this type of subordination to statutory law difers from ordinary forms of delegation. Local authorities' regulations are not genuine implementing regulations **vis-à-vis** the corresponding State or Regional statutes, for two reasons. First, because the very purpose of these statutes is to allow for sufficient normative diversity in order for local authorities to meet their own peculiar needs; secondly, because local authorities are democratically elected and politically accountable bodies, entitled to design their own policies. In sum, the relationship between statutory law and local authorities' regulations tends to be purely negative. Statutes function as a framework within which local authorities' regulations may freely operate.

5. Administrative rule-making procedure.

Spanish law does not provide for sufficient transparency and citizens' participation in administrative rule-making. This defect is particularly serious since administrative regulations play such a relevant quantitative role in Spain. It is true that draft implementing regulations must be submitted to the Council of State, which in Spain has only an advisory nature. The opinions of the Council of State may deal both with questions of legality and expediency, but they are not binding upon the Government. It is also true that several statutes impose the duty to submit draft regulations to public consultation, so that the citizens may express their opinion. This is a general duty for local authorities. But the procedure is predominantly written and administrative bodies tend to comply with it in a most buraeucratic way, thus discouraging people from participating. Moreover, there is no legal duty to publish the results of such consultation.

So far, the courts have been lenient concerning the compliance with participatory requirements. They have tended to scrutinize only the substantive legality of administrative regulations. However, in recent years there seems to be a new trend, as is shown by two rulings of the administrative section of the

Supreme Court (STS of 18 December 1988 and 17 January 1989) which invalidated two administrative regulations because they had been approved without due public consultation. In any event, a serious legislative reform is needed in this field.

6. Judicial review of administrative regulations.

As a form of administrative action, regulations are reviewed by administrative law courts (Arts. 58, 66 and 74 LOPJ), which are specialized divisions of Regional Superior Courts and the Supreme Court. In Spain, the duality of jurisdictions, ordinary and administrative, was abolished in 1904 and, since then, administrative law courts have always belonged to the ordinary judiciary. Given that administrative law courts alone have the power to review administrative action, only they may declare **erga omnes** the invalidity of unlawful regulations. Challenge against a regulation may be direct, for which any affected person has standing, or indirect. Indirect challenge takes place whenever the applicant for judicial review of an individual administrative decision questions the validity of the regulation on which such decision is legally based. Indirect review of unlawful regulations may also be accomplished **ex officio** by the court, even if the applicant has not made any allegation in this respect.

However, adjudication over administrative regulations does not constitute a genuine monopoly of any law court. All the other law courts (i.e. civil, criminal and labour courts) have a positive duty not to apply any administrative regulation which, being relevant to a case pending before them, is found to be unlawful because in contradiction with the Constitution, statutory law or a hierarchically superior regulation (Art. 6 LOPJ). This is a traditional principle of Spanish law, which derives directly from the idea of normative hierarchy. In other words, as far as administrative regulations are concerned, there exists a sort of diffuse or decentralized system of judicial review.

The Constitutional Court too may invalidate administrative regulations in two types of cases. First, through the **recurso de amparo**, whenever a regulation violates a fundamental right; secondly, there is a specific procedure for the national Government to challenge Regional administrative regulations which encroach upon State powers (Arts. 76 and 77 LOTC).

## IV. FRAMEWORK LAWS.

### 1. Legislative decrees.

Legislative decrees are governed by Arts. 82 to 85 of the Constitution. They are passed by the Government by virtue of a specific form of delegation which confers on them statutory force. So they may repeal or modify previous statutes. Their dual origin helps to explain their name, as well as the safeguards imposed on their use by the Constitution.

The delegation must be explicit and made by statute. It must be for a concrete and well defined subject-matter and must fix a deadline for its exercise. Contrary to ordinary delegation, it expires once the legislative decree is passed. The delegation must be adressed to the Government, which may not subdelegate to other bodies. However, if a delegation is still in force, the Government may veto any bill dealing with the same subject-matter. Needles to say, this does not imply that Parliament may not repeal the delegation at any moment. Finally, legislative decrees may not affect subject-matters which are constitutionally reserved to organic laws, introduce retroactive provisions or alter the delegating statute itself.

Legislative decrees play an important role whenever law-making presents serious technical difficulties or demands special expertise. In other words, if Parliament considers that it lacks adequate competence, legislative decrees are the appropriate instrument. By fixing binding guidelines, the delegating statute defines the policy objectives, which will have to met by the legislative decree issued by the Government. In particular, legislative decrees are constitutionally intended to fulfill two different functions: consolidation and drafting.

A) **The distinction between consolidation and drafting.**

In the case of consolidation, the delegating statute enables the Government to merge already existing statutory provisions dealing with the same subject-matter. Thus, for the sake of clarity and certainty, the entire legal regime of such subject-matter, which was so far disperse throughout a variety of statutues, is integrated into one single text (**texto refundido**). The delegating statute must define the subject-matter and state whether the delegation includes the possibility of clarifying and harmonizing the existing statutory provisions. Only in this case is the Government entitled to re-draft those provisions. Otherwiswe, its task is merely that of systematization.

The case of drafting is much more complex, because the Government is

authorized to create new law. The delegating statute must define the subject-matter and the scope of the delegation and, above all, fix carefully the principles and criteria to be followed. These guidelines (principles and criteria) take the form of a framework law, called **ley de bases**. The Government has to produce a systematic normative text (**texto articulado**) out of those guidelines. The legislative decree must to be in absolute conformity with the established guidelines.

Both law-making techniques have a long standing tradition in Spanish law. So the Constitution has simply acknowledged that practice introducing some additional safeguards. Consolidation has been particularly frequent in fields such as tax law, judicial procedure or criminal law. For example, the Criminal Code itself is embodied in a **texto refundido**. As for the experience of the **leyes de bases** and **textos articulados**, this device was first used in 1888 in order to overcome the difficulties inherent in the elaboration of the Civil Code, which is also a legislative decree. More recently, as a consequence of the accession of Spain to the European Community, it has been used too in order to tranpose the **acquis communeautaire** into the Spanish legal system.

B) **Characteristics of the legislature's guidelines**.

Delegating statutes are genuine framework laws, because they fix objectives whixh have to be met by legislative decrees. This is particularly true in the second of the above mentioned hypotheses, since the **ley de bases** does not play a purely instrumental function, but contains also substantive guidelines. No doubt, the delegating statute draws the limits within which the legislative decree may lawfully operate and, therefore, any excess will lead to the invalidity of the legislative decree.

However, it is generally accepted that the legal force of the delegating statute does not go beyond this point. In other words, the guidelines are not directly applicable. The Supreme Court's case-law, especially as far as the Civil Code is concerned, has always been extremely clear in this respect. At best, the gudelines may have some orienting value for the interpretation of the corresponding legislative decree.

C) **The debate about the forms of control over legislative decrees.**

Given their sratutory force, legislative decrees may be challenged before the Constitutional Court (Arts. 161 and 163 CE, Art. 27 LOTC). The Court may invalidate them either for substantive unconstitutionality or for **ultra vires**, i.e. excess with respect to the delegation. No doubt, if a legislative decree does not

comply with the conditions established by the delegating statute, it indirectly violates Arts. 82 to 85 of the Constitution.

Nevertheless, there is a scholarly debate about the additional possibilty of diffuse judicial review of legislative decrees. Supporters of this form of control think that, as far as a legislative decree is **ultra vires**, it may not be deemed to receive statutory force. Otherwise, the legislature's will, as expressed in the delegating statute, would be circumvented. The obvious conclusion is that, under these circumstances, the Government's enactment is a mere administrative regulation and, moreover, one which contradicts statutory law. And since it amounts to an unlawful regulation, any law court may disapply an **ultra vires** legislative decree. As a constitutional basis for this construction, some authors invoke the last paragraph of Art. 82, which provides that without prejudice to the jurisdiction of law courts delegating statutes may introduce additional mechanisms of control over legislative decrees. The relevant point for their argumentation lies in the plural form, because Art. 82 does not refer to the Constitutional Court, but to law courts at large.

This construction has been subjected to severe criticism. First of all, it has been pointed out that it was devised by liberal lawyers under the dictatorship, when of course there was no judicial review of legislation, in order to provide

for some sort of control. Nowadays, however, there would be no good reason to deviate from the centralized system of judicial review of legislation only in the case of legislative decrees. The rationale in favour of a single Constitutional Court (i.e. legal certainty about the validity of statutory law) is fully applicable to legislative decrees too. As for the literal argument derived from Art. 82, critics rightly say that the primary purpose of this constitutional provision is not judicial review of legislative decrees, but to allow the legislature to introduce additional mechanisms of control over them. In other words, Art. 82 says that additional safeguards may not affect judicial review. The plural form could be explained by the fact that, in order to obtain a preliminary ruling from the Constitutional Court, ordinary law courts too play a role in this respect.

Concerning the possibility of additional mechanisms of control over legislative decrees, one has to consider that legislative decrees come into force by virtue of a simple governmental decision; that is to say, they need not be ratified by Parliament. However, the last paragraph of Art. 82 allows Parliament to impose, case by case, some sort of ratification procedure. This possibility follows a tradition inaugurated by the first enactment of the Civil Code in 1888. On that occasion, the Parliamnet considered that the Government had not fully respected the guidelines and forced it to prepare a revised version of the Civil Code, which was at last ratified in 1889.

## 2. State and Regions: framework legislation and concurrent legislative powers.

Framework legislation appears also in the sphere of State and Regional concurrent legislative powers. In enumerating subject-matters over which Regions may be given legislative power, Arts. 148 and 149 of the Constitution often declare the State's right to regulate basic aspects of certain issues (administrative procedure, health care, environmental protection, etc.). The striking fact is that terminology is very similar to the one used by Arts. 82 to 85: **legislación básica** or **condiciones básicas**. But, as will be seen, this is a very different variety of framework legislation. Its complexity derives from the extraordinary richness of the relevant Constitutional Court's case-law, which is in permanent evolution. Such case-law has been predominantly produced through the settlement of conflicts between the State and the Regions. One has to keep in mind that the main object of this type of procedure before the Court is not to examine the constitutionality of norms, but to declare whose is a disputed power. For all these reasons, only a summary account will be given here.

For the sake of completeness, one must also mention that Art. 150.1 of the Constitution envisages the possibility for the State legislature to delegate legislative power to the Regions in subject-matters of State exclusive competence. Such delegation should take the form of non-directly applicable guidelines, which define the sphere and limits of Regional action. However, this constitutional provision has never been used so far.

### A) **Function and direct applicability of framework legislation.**

Framework legislation is the instrument for concurrent legislative powers. The guiding idea is that, in certain subject-matters, there must be a two-stage law-making process. The State regulates the basic aspects and the remaining field belongs to Regional legislation. However, this rough description is subject to many nuances and, in this sense, the starting point must be the inisistence of the Constitutional Court in differentiating this type of framework legislation from delegating statutes (STC 32/1981, 1/1982, etc.). The first consequence which may be drawn from such differentiation is that Regional concurrent legislative power does not derive from a delegation by the national Parliament, but directly from the Constitution and the statutes of autonomy.

This helps to clarify the function of framework legislation, which is not

so much to define the limits of Regional legislative power, as to allow the State to impose certain general, national policy objectives; and this function is fulfilled by the regulation of the basic aspects of each subject-matter where concurrent legislation is constitutionally possible. Thus, a body of common minimum rules may be created. But this right of the State finds some limits. Since by definition framework legislation does not operate in subject-matters of State exclusive legislative power, general policies must be compatible with Regional autonomous policies. Therefore, framework legislation must leave a suffiently broad margin of Regional legislative discretion, affecting only those aspects which are substantively basic, i.e. aspects which genuinely have national, general interest (STC 32/1983, 137/1986, etc.).

In sum, in the sphere of concurrent legislative powers, Regional legislation is not a mere development or implementation of State framework legislation. Perhaps, to define this type of State normative intervention as "framework" legislation is not entirely accurate. It does not establish guidelines to be followed by the Regions, but simply introduces some rules for the whole nation. Here lies another important difference in relation to delegating statutes: framework legislation is directly applicable (STC 1/1982). One must realize that paradoxically direct applicability works as a safeguard of effective Regional autonomy. Direct applicability is a consequence of the idea of common

minimum rules. But, contrary to what would happen if the State could fix binding guidelines, Regions are not positively obliged to follow a national policy objective.

This is the reason why, strictly speaking, framework legislation does not belong to the category of interposed norms. It is not hierarchically superior to Regional law. If Regional law deviates from framework legislation, it will not necessarily be unconstitutional. Usually, it will be disapplied by ordinary law courts, because in the sphere of concurrent powers State law prevails over Regional law (Art. 149.3 CE). In other words, Regional law does not have an **a priori** duty to respect certain provisions of State law; but if these State law provisions are intended to regualte basic aspects of a given subject-matter, they occupy the normative field and produce an effect of genuine preemption. This distinction between unconstitutionality and preemption has practical relevance because, in the case of preemption, Regional law remains formally in force and may be applicable again if State framework legislation disappears. This seems to be the most recent orientation of the Constituional Court's case-law (STC 125/1991).

B) **Its flexibility concerning formal requirements.**

Consistently with its statement that framework legislation (Arts. 148 and 149 CE) is different from delegating statutes (Arts. 82 to 85 CE), the Constitutional Court has always maintained a predominantly substantive concept of framework legislation. In its early rulings, the Court held that the mere formal characterisation of a State norm as framework legislation is not sufficient. Framework legislation must actually deal with basic aspects of a relevant subject-matter; that is to say, its substantive content must reflect a genuine national interest. As long as this general interest is not apparent, there is no framework legislation, no matter if the national Parliament has defined it as such or not (STC 1/1982, 76/1986, etc.). This is still the fundamental principle in this respect.

Moreover, in those same early rulings the Court declared that the condition of framework legislation does not necessarily require a formal characterisation. Given their nature and scope, certain State norms are framework legislation in any event. This is due to the fact that they regualte basic aspects of relevant subjet-matters (STC 32/1981, 1/1982, etc.). In order to understand this early doctrine, which represents the highest degree of

antiformalism, one has to take some factors into account. At that time, the tendency to consider framework legislation as part of interposed norms (i.e. as an instrument to define the distribution of powers between the State and the Regions) was much stronger than at present. The obvious consequence was to think that without previous framework legislation the Regions were prevented from exercising their concurrent legislative powers. So the State might paralyze an important part of newly acquired Regional autonomy by simply not enacting framework legislation. It was precisely to avoid such potential obstructionist strategy that the Court ruled that framework legislation might be inferred from preexisting State law. Those really basic aspects of legislation govening each relevant subject-matter were to be considered as framework legislation (STC 32/1983, 29/1986, etc.).

Time passed by and the State started to pass specific framework legislation. Its true function was progressively clarified. At that point, the danger was no longer potential obstructionism, but an excess of framework legislation due to the fact that, in principle, many norms could substantively qualify for that condition. The Constitutional Court reacted and began to demand more formal conditions for framework legislation. The consequence is that, at present, framework legislation must identify itself as such for the sake of legal certainty. Needless to say, this does not affect the substantive requirement, which is still

valid. Only in exceptional circumsatnces is the Court prepared to accept anonymous State norms as framework legislation (STC 69/1988, 13/1989, etc.).

The question of hierarchy has undergone a similar evolution. At the beginning, the Constitutional Court admitted that framework legislation might occasionally be embodied in administrative regulations. This was especially so whenever the preexisting State law containing framework legislation was to be found in rules prior to the Constitution itself, i.e. rules dating from a time when reserves of statutory law were much more loose (STC 96/1984). Nowadays, framework legislation must be enacted in statutory form, although the possibility that implementing regulations share the framework legislation nature of their corresponding statutes exists (STC 69/1988, 13/1989, etc.). Moreover, it is generally admitted that framework legislation need not be embodied in specific statutes. For the sake of systematic coherence, statutes dealing with each relevant subject-matter may declare which of their provisions have the condition of framework legislation.

## V. OTHER SOURCES OF LAW.

### 1. Collective agreements.

Through collective agreements, workers' unions and employers' associations establish labour conditions (salaries, working hours, holidays, etc.). Thus, they are essentially a mechanism of negotiation and self-regulation. In Spanish law, collective agreements have a long standing tradition and play a relevant role, both of which are not entirely alien to the paternalistic and corporatist ideology of dictatorship. At present, the right to collective bargaining is constitutionally recognised, as is the binding force of its outcome: collective agreements (Art. 37 CE).

In Spain, collective agreements are governed by the **Estatuto de los Trabajadores** of 1980, which is the general statute in the sphere of labour law. Collective agreements are not a purely private contract, binding among those who have negotiated it. On the contrary, as long as they have been regularly concluded, they posess **erga omnes** force, of course within the corresponding territory (nation, region, province) and sector of industry. The position of collective agreements among sources of labour law is twofold: first, they are hirerarchically subordinated to State and Regional statutes and administrative

regulations and, consequently, are invalid if in contradiction with them; but, secondly, valid collective agreements are **lex specialis** in relation to statutes and regulations and, therefore, enjoy applicative priority over them. The same pattern governs relations among collective agreements themselves: more concrete collective agreements, by reason of territory or sector, are subordinated to the more general ones, but at the same time they are applied in the first place. Judicial review of collective agreements lies within the jurisdiction of labour law courts. However, contrary to what happens with administrative regulations, private individuals may challenge the validity of a collective agreement only incidentally, i.e. when it is relevant for the ruling of a pending case. This statutory ban on individuals' direct challenge against collective agreements has been upheld by the Constitutional Court, since it represents a reasonable deterrent against potential obstructionist manoeuvres by minor workers' unions or employers' associations (STC 47/1988 and 124/1988).

This leads directly to the procedural problem of collective bargaining. Since collective agreements are genuine sources of law, they must be concluded through a procedure with appropriate guarantees. The basic question in this respect is who may negotiate and conclude generally binding collective agreements. In order to avoid an unmanageable multiplication of interlocutors, Spanish law has adopted the formula of "most representative" workers' unions;

that is, only those workers' unions which have reached a minimum degree of representativeness in a given territory or sector are entitled to participate in collective bargaining. Such representativeness is determined by the results of periodical elections for workers' representatives. However, the Constitutional Court has held that this idea of representativeness may not be used for any other purpose and, particularly, to define which workers' unions may take part in the supervision of those elections. For the sake of transparency, every workers' union running in the elections is allowed to sit in the supervisory bodies (STC 7/1990 and 32/1990). An additional procedural guarantee lies in the duty to register collective agreements in a public record, which assures their publicity.

2. Rule-making by private persons.

Rule-making by private persons does not present peculiar characteristics in Spanish law. Generally speaking, it follows the normal pattern of most legal systems which belong to the civil law family. However, for the sake of completeness, reference will be made to the two major forms of law-making by private persons: custom and private autonomy.

A) **Custom**.

Customary law consists of rules and principles created through usage and social practice. In order to be a real custom, usage must be accompanied by the so-called **opinio iuris sive necessitatis**, i.e. the general acceptance that such usage is legally binding. In addition, a firmly rooted case-law tradition declares that the maxim **iura novit curia** is not applicable to customary law. In other words, given the uncertainty about some customs, law courts may require the party invoking a customary rule to prove its existence and scope. Custom operates predominantly in the field of private law. Its importance as a genuine source of law is clearly lesser in other areas of the legal system.

Art. 1 of the Civil Code provides that custom is applicable in the absence of legislation, which in this context is synonymous with written law (administrative regulations as well as statutory law). Consequently, custom is a subsidiary source of law. In order to be valid, custom must not be contrary to legislation or to generally accepted moral standards. This means that there is no room for customs **contra legem**. As for merely interpretative usages or customs **secundum legem**, they are not considered to be binding except in those cases where there is an explicit legislative reference to them. In other words, since by definition custom only operates in the absence of legislation, in the process of

interpretation and application of law judges are not obliged to follow social practices but only legislation itself (Art. 117.1 CE). In the field of business law, where custom usually plays a particularly relevant role, the situation is basically the same. In fact, Art. 2 of the Code of Commerce of 1885 provides that comercial usages are applicable in the absence of legislation. One important practical difference lies in the fact that commercial usages are often unofficially codified by private entities (chambers of commerce, banks associations, etc.), thus facilitating their knowledge and improving legal certainty at large.

The status of custom is different in some Regions which have their own systems of private law. Since the unification of Spanish private law and the introduction of a single, national Civil Code proved to be extremely difficult along the whole 19th century, a political compromise was reached. Regions with specific private law institutions were allowed to preserve them, especially in the areas of family law and law of succession. At present, this situation enjoys constitutional support (Art. 149.1.8 CE). As a result, in some of these Regions (for example, Navarre), customary law takes precedence over legislation and, in this sense, one may speak of customs **contra legem**.

Apart from its function as a subsidiary source of law, custom also serves a different objective as an instrument for the interpretation of contracts. Art.

1287 of the Civil Code and Arts. 52 and 59 of the Code of Commerce establish that obscure clauses in contracts must be interpreted in conformity with usage. Moreover, according to Art. 1258 of the Civil Code, parties to a contract are obliged not only to its explicit clauses, but also to what is usual in the corresponding type of transaction.

B) **Private autonomy**.

Private autonomy involves the freedom of self-regulation of private law relationships, especially those having an economic nature. In societies founded on economic liberalism, such right of self-regulation is the major source of legitimacy for law-making by private persons. In Spain, private autonomy is given general recognition by Arts. 1091 and 1255 of the Civil Code. Nowadays, the fundamental rights of private property and economic initiative (Arts. 33 and 38 CE) provide private autonomy with constitutional protection. In private law transactions, individuals are entitled to introduce those clauses they consider to be appropriate, with only the limits of generally accepted moral standards and imperative legislative rules (**ius cogens**). This means that, in principle, individuals have a right to derogate from private law legislation, which has a subsidiary function. The major law-making manifestations of private autonomy take place in the field of contracts, as well as in that of the creation of moral

persons (corporations, associations, foundations, etc.). Although they have a private origin, the governing rules of such entities are acknowledged by the legal system.

3. Regulations of semi-public bodies.

In Spain, there is a long list of moral persons whose rules are recognised as part of the legal system and, consequently, enforced by law courts. Such list includes professional associations (medical doctors, practising lawyers, etc.), chambers of commerce, users of public water resources, etc. In the past, when the official political culture was clearly oriented towards corporatism, these moral persons were regarded as a prolongation of public administration. Nowadays, a much more liberal approach prevails. They are, in principle, private associations because they are set up and organized on private initiative. But since the legislature may make them responsible for the fulfillment of certain public functions, they present a public aspect too (STC 89/1989), which allows to speak of semi-public bodies. For example, lawyers' associations initially have private objectives (information, medical insurance, etc.), but they also carry out some statutorily defined tasks, such as verification of the conditions of access to the profession or disciplinary sanctions for professional misbehaviour.

As far as they fulfill public functions, the regulations and decisions of these semi-public bodies are considered to be administrative action and are subject to judicial review by administrative law courts. Needless to say, regulations passed by semi-public bodies are not binding on the general public, but only on those individuals who belong to the corresponding category. These regulations are hierarchically subordinated to statutory law and are **ultra vires** whenever impose duties not envisaged by the delegating statute.

4. Administrative guidelines.

Statutes dealing with the organization of public administration enable high officials to issue guidelines, which must be addressed to their subordinates. This power is constitutionally based upon the hierarchical structure of public administration (Art. 103.1 CE) and is necessary for bureaucratic command and coordination. It may be exercised through single orders or general circular letters and instructions. Strictly speaking, only these general instructions deserve the characterization as administrative guidelines. Since they need not be officially published, it may be difficult to know of their existence or to be sure about their contents.

Nobody questions the admissibility of this type administrative guidelines

or their compulsory nature for administrative officials. The major problem, on the contrary, has always been that of their binding effect **vis-à-vis** private individuals and their justiciability. In other words, administrative guidelines constitute a clear legal notion in the internal sphere of public administration, but their status is ambiguous as far as the relationship between public administration and private individuals is concerned. This may be particularly serious in some areas of administrative action, especially those related to economic regulation, where administrative guidelines play a very relevant role.

The Supreme Court's case-law tends to deny adminsitrative guidelines the nature of genuine administrative regulations because they do not meet the required formal and procedural conditions (STS of 16 June 1981, 20 December 1983, etc.). As a corollary, private individuals are not directly bound by them. But such conclusion does not solve two further problems. First, if an administrative decision is based on a guideline, may the affected individual challenge its validity arguing that the guideline is unlawful?; and secondly, if an administrative body deviates from a guideline, may the affected individual invoke it in his favour? Spanish case-law is not at all clear in this respect. Concerning the first question, the Supreme Court seems not to accept the justiciability of administrative guidelines (STS of 18 April 1983 and 30 September 1983). As for the second, in the absence of significant case-law, one

might argue that derogating from an administrative guideline ammounts to a violation both of the principle of equality and the doctrine of estoppel (**venire contra factum proprium**).

## VI. INTERNATIONAL LAW, COMMUNITY LAW AND DOMESTIC LAW.

### 1. International treaties and domestic law.

The Spanish Constitution is relatively poor concerning the status of general or customary international law within the domestic legal system. The Preamble of the Constitution proclaims that, among the objectives of the nation, is the desire to strengthen peaceful and cooperative relations with all other peoples. In a more concrete way, Art. 10.2 of the Constitution states that the constitutional provisions declaring fundamental rights must be interpreted in conformity with international treaties on human rights ratified by Spain and with the Universal Declaration of Human Rights. Nevertheless, the Constitution is much more precise as far as international treaties are concerned. In this field, one has to diffrentiate between the position of treaties in domestic law and the conditions for their valid conclusion.

#### A) **The position of treaties in the national system of sources of law.**

Spain has a monistic approach to the question of the relationship between international treaties and domestic law. In fact, Art. 96.1 of the Constitution is

absolutely clear in declaring that, if they are validly concluded and published in the official journal, international treaties form part of the domestic legal system. So they are directly applicable and enforceable by law courts. Moreover, according to Art. 96.1, only through the appropriate procedure envisaged by treaties themselves or by general international law (i.e. the law of tretaies as codified by Convention of Vienna) may rules included in international treaties be repealed, amended or suspended. This means that, in their condition as sources of domestic law, international treaties may not be affected by other sources, including statutory law. This constitutional provision has led some authors to think that, in the Spanish legal system, treaties are hierarchically superior to any other source of law except the Constitution itself. In particular, they would be in an intermediate position between the Constititon and statutory law.

The first part of such statement is undobtedly accurate, since international treaties are subordinated to the Constitution and, consequently, are invalid if in contratdiction with it. They may be challenged before the Constitutional Court in the same way as statutory law, i.e. either directly or indirectly (Art. 27 LOTC). In addition, the conclusion of an international treaty including a provision contrary to the Constitution requires a pior constitutional amendment; and, in this respect, either the Government or a house of Parliament may ask the

Constitutional Court for an advisory opinion, which has a binding effect (Art. 95 CE). This is the only hypothesis in which the Constitutional Court is allowed to give advisory opinions.

The relationship between international treaties and statutory law is not so clear-cut. No doubt, Art. 96.1 prevents the legislature from repealing or modifying a treaty already in force and, in this sense, one may say that treaties are stronger than statutory law. However, this peculiar force of international treaties does not ammount to a superior hierarchical position, at least for two reasons. First, it is not clear whether international treaties may repeal previous legislation. It seems that Art. 96.1 simply involves applicative priority. So previous legislation incompatible with a treaty is not applicable, but it remains formally in force. The consequence is that, if the treaty is abrogated, that legislation will automatically be applicable again. Secondly, international treaties are not considered as criteria for the assessment of the constitutionality of statutory law; that is, international treaties do not belong to the category of interposed norms. This implies that a statute passed in contradiction with a treaty already in force is not unconstitutional, but simply inapplicable.

B) **Requirements for the conclusion and denunciation of treaties.**

As has been mentioned, international treaties become part of the domestic legal system if they have been validly concluded and officialy published. For this purpose, a valid conclusion is not only one in conformity with international law itself, but also one which complies with constitutional requirements. As far as the State's assent to a treaty is concerned, the Constitution envisages three hypotheses. First of all, whenever a treaty involves transfer of powers deriving from the Constitution (i.e. sovereign rights) to an international organization, the signature requires prior parliamentary authorization by an **ad hoc** organic law (Art. 93 CE). This constitutional provision was intended to cover Spanish accession to the European Community and was actually used in 1985 for that purpose. It had not been used, however, when Spain joined NATO, probably because the Government felt there was not a suffient parliamentary majority. The issue was legally unclear, because Spain refused to become a member of the unified military command and, consequently, there was no direct transfer of sovereign rights; but, in any event, the procedural choice raised strong political criticism and ultimately led to a consultative referendum. Secondly, there are some categories of international treaties (treaties of political or military nature, treaties involving public expenditure, etc.) whose conclusion requires prior

parliamentary authorization (Art. 94.1 CE). According to the standing orders of both houses of Praliament, this authorization is not intended to take the form of a statute but of a resolution. Lastly, all other treaties do not require prior authorization. The Government is free to give the State's assent, but must inform Parliament immediately after (Art. 94.2 CE).

Two further aspects deserve to be noticed. On the one hand, under Spanish law, treaties need not be ratified. As has just been observed, parliamentary control over the Government's conclusion of international treaties takes place **a priori**, in the form of an authorization which, by definition, imposes some limits. On the other hand, the Government has a statutory duty to submit every draft treaty to the Council of State for a non-binding advisory opinion. This opinion, which is usually followed, contains an indication about the most appropriate procedure.

2. Community law and domestic law.

Spanish accession to the Europen Community did not pose any specific constitutional problems. Spain had been able to take advantage of other Member States' experience in this respect and, consequently, Art. 93 had been included into the Constitution precisely in order to facilitate accession and membership

to the Community. This constitutional provision has been used not only for accession itself, but also for later amendments to the Constitutive Treaties: the Single European Act and the Treaty of Maastricht. In sum, from the point of view of primary Community law, only an **ad hoc** organic law is constitutionally needed.

If a new provision of the Constitutive Treaties is in contradiction with the Constitution, a prior constitutional amendment is unavoidable (Art. 95.1 CE). This happened when the Treaty of Maastricht introduced a new Art. 8B into the EEC Treaty. Since Art. 13.2 of the Spanish Constitution only envisaged foreigners' active suffrage in local elections but not their right to run for office, a constitutional amendment was approved in 1992. This constitutional amendment followed an opinion of the Constitutional Court delivered on 1 July 1992, which had been requested by the Government in compliance with Art. 95.2 of the Constitution.

The principles of direct effect and supremacy of secondary Community law have never raised any serious constituional objection. It is generally accepted that they are inherent to the notion of transfer of powers deriving from the Constitution. In other words, nobody questions that Art. 93 of the Constitution provides sufficent ground for full applicability of Community

legislation within the domestic legal system.

3. The attitude of the Constitutional Court towards European integration.

On the whole, one may fairly say that the Spanish Constitutional Court has a positive and cooperative attitude towards European integration. In the above mentioned opinion of 1 of July of 1992, concerning the constitutionality of the Treaty of Maastricht, the Court held that only with respect to the issue of suffrage in local elections was a previous constitutional amendment needed. In comparison with similar judicial rulings in other Member States, the Court adopted a literal approach to constitutional interpretation in the case of the Treaty of Maastricht. So only that provision of the Treaty which was in open contradiction with the Spanish Constitution was considered to be unconstitutional. This means that, as far as the expansion of the Constitutive Treaties is concerned, the Court is prepared to accept that Art. 93 of the Spanish Constitution provides, in principle, enough constitutional basis. There is no reason to think that such attitude will change in the forseeable future. Probably, this attitude of the Constitutional Court is not alien to the fact that there is a very wide political consensus in Spain concerning European integration.

Despite this overall openness of the Constitutional Court, some nuances

about the status of Community law within the Spanish legal system emerge from its case-law. The Court's most important doctrine in this respect concerns the principle of supremacy. Although it acknowledges that Community law prevails over domestic law, the Court has clearly said on several occasions that supremacy of Community law does not involve its constitutionalization **en bloc**. Thus, when the Spanish law governing elections to the European Parliament (which establishes a single constituency for the whole country with a purely proportional electoral formula) was challenged, the Court ruled that, in any event, a hypothetical violation of Community law does not ammount to the unconstitutionality of the law. Moreover, the Court said that it is not its duty to watch over the compliance of domestic law with Community law as a whole, but only with those of its principles having constitutional implications (STC 28/1991). The same idea of non-constitutionalization of Community law is applicable in the sensitive field of fundamental rights. Thus, rights recognized by the Constitutive Treaties do not automatically acquire the condition of fundamental rights, especially to the effect of their protection through the **recurso de amparo**. This privileged form of judicial protection is applicable to them only as far as they are also recognized by the Spanish Constitution. Otherwise, in constitutional terms, they simply have an interpretative value by virtue of Art. 10.2 of the Constitution (STC 64/1991). This does not mean, of course, that such rights are not directly operative at a sub-constitutional level.

As a corollary, it is clear in the Court's case-law that the principle of supremacy of Community law does not enable Spanish public authorities to derogate from the Constitution.

This doctrine is particularly relevant for the relationship between the State and the Regions. In an early case, the Court had to rule a conflict between the State and Catalonia concerning the implementation of a Community directive in the field of agriculture. The directive explicitly stated that implementation should be accomplished by the corresponding "central authority" in each Member State, presumably in order to insure its uniform applicaction. However, the Constitutional Court held that the definition of what is a central authority in Spain is not a responsibilty of the European Community, but belongs to the the Spanish Constitution. Consequently, it declared that, in the relevant subject-matter, the autonomous Region of Catalonia was to be constitutionally considered as the central and ultimate authority (STC 252/1988). In other words, membership to the European Community does not affect the constitutional distribution of powers between the State and the Regions.

In the end, one may conclude that the Spanish Constitutional Court does not distrust European integration and is ready to cooperate with European institutions, including the European Court of Justice. Nevertheless, it seems also

determined not to allow circumventions of unambiguous provisions and principles of the Spanish Constitution.

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